(32)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 898

FRED LOCHMANN,

Petitioner,

vs.

ED SYKES FOR AND IN BEHALF OF HIMSELF AND CERTAIN OTHERS SIMILARLY SITUATED AND AS AGENT FOR THOSE OTHERS, TO-WIT: MACK PHILLIPS, JOHN W. PHILLIPS, LEWIS GRIFFIN, LEROY GRIFFIN, WESLEY V. LEWIS, AND ALBERT HEADLEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS AND BRIEF IN SUPPORT THEREOF.

FRED HINKLE,
Counsel for Petitioner.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Comes now your petitioner, Fred Lochmann, and respectfully represents to the Court:

I.

Summary Statement of Matter Involved.

This case was begun in The District Court of Sedgwick County, Kansas, by the respondents seeking to bring the

petitioner under the provisions of the Fair Labor Standards Act of Congress, 1938 (U. S. C. A. Title 29, Sec. 201 et seq.).

A. The petition of the respondents alleges that the petitioner (defendant below) was engaged under the trade name of The Sunflower Sausage and Packing Company in the slaughtering of livestock, packing and curing of meat and meat products and that he was engaged in interstate commerce and in the production of goods for interstate commerce (R. 14).

The District Court found that the petitioner was engaged in the slaughtering of live stock, packing and curing of meat and sausage and meat products but made no shipment of goods outside of the State of Kansas, filled no orders for shipment to customers outside of Kansas, sold his goods to customers only in the State of Kansas, and was not subjected to Federal Inspection (R. 223). The Trial Court, however, found that the petitioner sold the hides off cattle slaughtered by him to the Reed Hide Company in Wichita, Kansas, which company was engaged in buying hides and after bailing and salting the hides, shipped them to concerns outside of the State of Kansas, all within the knowledge of the petitioner. The Trial Court further found that the petitioner sold the offal and hooves to the Wichita Desiccating Company in Wichita, which after making them into by-products shipped the by-products to points outside of Kansas (R. 227). The petitioner parted with title to these articles at his dock and exercised no further control over them. The Trial Court found that the respondents, in skinning the hides off the cattle, separating the bones from the meat, cutting off the hooves and separating the offals, constituted the production of goods for interstate commerce and that the petitioner in so doing did not comply with the Fair Labor Standards Act (R. 225). The judgment of the Trial Court was affirmed in its entirety

by the decision of the Supreme Court of Kansas (R. 234 et seq. 156 Kans. 223, 132 Pac. (2nd) 620).

B. The Trial Court found that the respondents, during the time which they worked for the petitioner, only worked a portion of their time in the performance of the duties above set out. (Finding 15, R. 228 and R. 237-238.) The Supreme Court of Kansas in its decision correctly assumed that the producing of these articles worked on by the respondents was only a small percentage of the production of the petitioner's plant (R. 238). That is to say; only a small portion of the time in which the respondents worked for the petitioner was consumed in the skinning of cattle and cutting out the bones and offal. The petitioner urged at every stage of the trial, before the Trial Court and before the Supreme Court of Kansas, that the burden was upon the respondents to establish the amount of time they consumed in working on these articles and separate the same from the time they worked on other articles, which, all conceded, could not be subjected to the impact of the Fair Labor Standards Act. This was brought before the Trial Court on written requests for instructions and to submit special questions to the jury, (Requested instructions 10, 11, 12, see R. 151-152 and Request for question 4, R. 147) and before the Supreme Court of Kansas by specifications of error (R. 238 et seq.) by argument in brief and upon motion for rehearing. The Petitioner constantly urged that the only time in which he could be subject to the condemnation of the Act was during that time his employees, the respondents, were in the production of goods for interstate commerce, which is conceded, was but an infinitesimal portion of their time. The undisputed evidence showed that the relation of the hides to the total business of the petitioner was 2.9 per cent in so far as money value of the business was concerned. The bones and offal and

hooves sold to the Wichita Desiccating Company brought twenty to thirty dollars per week (R. 123-124). An inconsequential portion of the whole business of the petitioner.

The Trial Court held that the petitioner was subject to the provisions of the Act during the whole of the time the respondents were in his employ regardless of the character of the work they were performing and the decision of the Trial Court was affirmed in its entirety by the Supreme Court of Kansas.

C. The petitioner, in event he should be held to be subject to the Act, elected to exempt himself from the operation of the Act for a period of fourteen (14) consecutive weeks in each consecutive year, beginning January first, by virtue of Section 7 (c) of the Act (R. 139) (29 U. S. C. A. Sec. 207 et seq.) (Inter. Buln. No. 14, Pg. 11) (R. 239):

> "In the case of an employer engaged in the first processing of * * * any agricultural * * * commodity * * *, or in handling, slaughtering, or dressing * * * livestock, the provisions of subsection (a) during a period or periods of not more than fourteen weeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

In determining this question, the Supreme Court of Kansas, in affirming the judgment of the Trial Court, says: "Under finding fifteen of the Trial Court, the plaintiffs (respondents here) devoted only a part of their time to handling, slaughtering and dressing live stock and a part of their time to non-exempt activities". It will be observed that the opinion of the Supreme Court of Kansas recognizes that the respondents worked only a portion of their time in the preparation of goods for interstate commerce and for that reason the Court refuses to allow the petitioner the fourteen week exemption from the Act as provided in Sec-

tion 7 (c) of the Act. We, of course, contend that the respondents did not work any of their time in the preparation of goods for interstate commerce, (see A above) but if the decision of the Supreme Court of Kansas is correct that the respondents only worked a portion of their time in the preparation of goods for interstate commerce, then surely the decision must be incorrect in subjecting the petitioner to the impact of the Act for the benefit of the respondents during the whole period of the time which the respondents were in the employment of the petitioner: on the other hand, if the opinion is correct in that the petitioner was subject to the terms of the Act during all of the time that the respondents were in his employ, then the petitioner is entitled to the fourteen week exemption under Sec. 7 (c) of the Act. For that reason we contend that the opinion of the Supreme Court of Kansas is not consistent with itself, holding on the one hand that the respondents are entitled to the benefit of the Act for work weeks of sixty-three and one-half hours per week (R. 221), and time and one-half for overtime during all of the time they were in the employment of the petitioner, and on the other hand holding that the petitioner cannot take advantage of the Act when it reflects in his behalf because the respondents did not expend all of their time in the preparation of goods for interstate commerce (R. 240).

D. The Supreme Court of Kansas affirmed the Trial Court in allowing judgment for the respondents under the Act, the sum of $4938.36, and in addition thereto, allowed the respondents attorney fees in the additional sum of $3,000.00 (R. 233-234). The Act provides that if a recovery is had by the employees, the Court shall assess in their behalf a reasonable attorney fee against the employer (29 U. S. C. A. Sec. 216 b). We contend that the Court committed abuse of discretion in assessing so large an attorney

fee, that this allowance constitutes in this case, a misinterpretation of the Act, that Congress did not contemplate such a burden being placed upon a citizen, who, in good faith, seeks the judgment of the Courts in an attempt to honestly and fairly determine his rights. That the allowance made here is wholly incompatible with a proper construction and interpretation of the Act of Congress (R. 240).

A certified copy of the entire record of this case in the Supreme Court of Kansas is hereby furnished as an exhibit to this application.

II.

Jurisdiction.

(1.) The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 344 (Jud. Code, Sec. 237 (b) as amended), also *Higgins* vs. *Carr Bros. Company,* 87 Law Ed. 398, U. S. —. Decided January 18, 1943, No. 97, October Term, 1942.

(2.) The judgment became effective in the Trial Court April 4th, 1942 (R. 235). An appeal was duly perfected and the decision of the Supreme Court of Kansas was filed January 9th, 1943 (R. 233). Motion for Rehearing was filed January 23rd, 1943 (R. 241). Motion for Rehearing was denied on February 1st, 1943 (R. 241). The decision and judgment of the Supreme Court of Kansas became final and was entered February 1st, 1943. On February 8th, 1943, the Supreme Court of Kansas granted an order staying the execution of judgment and staying the mandate for a period of ninety (90) days from February 1st, 1943, within which to enable Fred Lochmann, petitioner herein, to apply to The Supreme Court of the United States for a Writ of Certiorari and to docket the case, etc. (R. 246-248).

(3.) At each stage in the proceedings in the Trial Court and in the Supreme Court of Kansas upon appeal and upon motion for rehearing, the petitioner raised every question which he presents here concerning the application and interpretation of an Act of Congress known as The Fair Labor Standards Act of Congress 1938, (U. S. C. A. Title 29 Sec. 201 et seq.) The questions were first raised in the Trial Court by Petitioners (defendants) in defendant's answer (R. 25) then by demurrer to respondent's evidence and motion for directed verdict (R. 89-90) and again for directed verdict (R. 134-135) and by requests for special questions (R. 146) and by requests for special instructions (R. 148) and on motion for new trial (R. 203), motion for judgment notwithstanding verdict of jury (R. 205), supplemental motion for new trial (R. 205), supplemental motion for new trial on special issues (R. 207), motion to make certain findings of fact and conclusions of law and to strike certain findings of fact and conclusions of law made by the Trial Court (R. 210), by second supplemental request for findings of fact and conclusions of law, and to strike certain findings and conclusions (R. 214 et seq.). All of the demurs, motions for directed verdict, requests to submit special questions and instructions, requests for special findings and conclusions, motions for new trial and to strike certain findings and conclusions were overruled and denied by the Trial Court. (R. 92, 93, 143, 217, 232, 234, 235, 236.) In the Supreme Court of Kansas the questions were presented on specifications of error (R. 238 et seq.) and on Motion for Rehearing which was denied (R. 241).

(4.) The Supreme Court of Kansas is the highest Court in and for the State of Kansas and the highest Court in and of the State of Kansas in which the decision could be had, and the decision was finally entered there upon the denial of the motion for rehearing, February 1st, 1943 (R. 241).

(5.) The petition for the writ is presented under Rule 38, Paragraphs one and five, Sec. A, of the Revised Rules of this Court adopted February 13, 1939, and effective February 27th, 1939.

III.

Questions Presented.

The questions presented on this petition may be stated as follows:

A. Are the employees (respondents) of the petitioner engaged either in interstate commerce or in the preparation of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938 (U. S. C. A. Title 29, Sec. 201 et seq.), when they simply skin hides from cattle, cut bones, hooves, and offal from the slaughtered animals in order to obtain the edible meat, when the hides, bones, hooves, and offal are sold by petitioner at his dock, taken by the purchasers under their own title to their own plants where they are processed or made into by-products and in such changed form are ultimately transported to other states by the purchasers?

B. Are the employees of the petitioner entitled to have the benefits of the wage scale set up by the Fair Labor Standards Act during all of the time they are in the employment of the petitioner when only a small portion of their time is consumed in working on or preparing goods which are alleged to move in interstate commerce, when they work the greater portion of their time on goods which they concede are not being prepared for interstate commerce?

C. If the employees of the petitioner are engaged in the preparation of goods for interstate commerce, then is not the petitioner entitled to claim a fourteen (14) week ex-

emption from the operation of the Act under Sec. 7 (c) of the Act?

D. If the employees of the petitioner are engaged in the preparation of goods for interstate commerce and if in such an event it is the duty of the Court to fix a reasonable attorney fee to be paid by the petitioner under Sec. 16 (b) of the Act, then has not the Court, in fixing an attorney fee of $3,000.00 in addition to allowing a judgment of $4938.36, abused its discretion, gone beyond the reason and spirit of the Act and beyond the intention and contemplation of Congress when it framed the Act?

Reasons for the Allowance of the Writ.

The petitioner relies on the following reasons for the allowance of the writ of certiorari:

A. The Supreme Court of Kansas in affirming the judgment of the Trial Court held that the respondents (plaintiffs below), while they were employees of the petitioner, produced goods for interstate commerce within the meaning of the Act of Congress in question here is in conflict with the following decisions, which hold that indirect effect only on interstate commerce will not bring the employees of the petitioner under the Act.

Schecter v. *United States,* 295 U. S. 495, 79 Law Ed. 1570, where it is said,

> "* * * the distinction between direct and indirect effects of instrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."
>
> "Where the effect of intrastate transactions upon interstate commerce is merely indirect, they do not fall

within the power conferred upon Congress by the Commerce Clause of the Federal Constitution."

Jewell Tea Company v. *Williams,* 118 Fed. (2nd) 202, where it is held by The Tenth Circuit Court of Appeals that:

"* * * the mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Santa Cruz Fruit Packing Company v. *National Labor Relations Board,* 303 U. S. 453, 82 Law Ed. 954. The Court said:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection."

National Labor Relations Board v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 Law Ed. 893.

"The scope and power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Kirschbaum v. *Walling,* 316 U. S. 517, 86 Law Ed. 1638. This case holds that each case must be determined on the exact facts to determine whether or not the Act was intended to, or does, cover the activities of the party.

United States v. *Darby Lumber Company,* 85 Law Ed. 395, 312 U. S. 100. The Court said in construing the phrase 'produced for interstate commerce':

"It embraces at least the case where an employer engaged, * * * in the manufacture and shipment of goods in filling orders of extra-state customers, manufactures his products with the intent or expectation that according to the normal course of his business, all or some part of it will be elected for shipment to those customers."

B. The Supreme Court of Kansas, in holding that the employees (respondents) of the petitioner were entitled to the benefits of the Act for all of that period of time which they were in the employment of the petitioner regardless of the character of work they were performing and when by the undisputed facts they worked only a small portion of their time on products, which could ever, by any conception, and even in a changed form, enter the arteries of interstate commerce, went further than the terms of the Act will permit.

Warren-Bradshaw Drilling Company v. *Hall*, — U. S. — 63 S. Ct. 125, 87 Law Ed. 99. The Court said:

"The burden was therefore upon the respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees engaged in the production of goods within the meaning of the Act, and that such production was for interstate commerce."

Walling v. *Jacksonville Paper Company*, 87 Law Ed. 393, No. 336, October Term, 1942, decided January 18, 1943. The Court said:

"The applicability of the Act is dependent on the character of the employee's work." If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was

established by the test we have described, he is covered by the Act.

We submit that even if we should adopt the view of the Supreme Court of Kansas that the skinning off the cattle hides and separating the bones and offal from the edible meat constitute the preparation of goods for interstate commerce within the meaning of the Act, that nevertheless the time expended on such work by the employees here was so inconsequential and unsubstantial as compared to the other work which they performed that this portion of their work does not bring them within the Act.

C. If the decision of the Supreme Court of Kansas should be held to be correct and if the respondents are engaged in the production of goods for commerce, then the petitioner is entitled to take an exemption from the Act for a period of fourteen (14) weeks for each employee so engaged and in each calendar year under Section 7 (c) of the Act. (29 U. S. C. A. Sec. 207 et seq. Sec. 7 c, also Interpretative Bulletin No. 14, Page 11, issued by United States Department of Labor, June, 1940).

The Supreme Court of Kansas seems to be the only appellate Court which has passed on this question. The case of *Fleming* v. *Swift and Company,* 41 Fed. Supp. 825, holds this exemption cannot be claimed if the employee works a part of his work week on goods that are not in interstate commerce. Here, however, the petitioner is held to be under the Act for all of the weeks which the respondents worked and it appears to us that if such a holding is to stand then the petitioner is entitled to the exemption. To hold otherwise is to cause the decision to confound itself.

D. We believe that the Supreme Court of Kansas, in allowing an attorney fee to the respondents of $3,000.00

for the work of their attorneys in recovering a judgment of $4,938.36, went further than the Act will permit.

The Supreme Court of Tennessee, in *Robinson & Company,* v. *La Rue,* 156 S. W. (2nd) 432, allowed an attorney fee of one dollar where the total recovery was $1,111.80. We call the Court's attention to the excellent dissenting opinion of Huxman, Circuit Judge, in *Midcontinent Pipe Line Company* v. *Hargrove,* 129 Fed. (2nd) 655, which we think very applicable here. The authorities on this question are not numerous and we have found none that make such an extreme interpretation of the Act as the Supreme Court of Kansas, the result is a very extreme hardship on the petitioner in making an honest effort to have a judicial determination of his rights.

Wherefore, your petitioner respectfully prays that this Honorable Court order as follows:

a. That a writ of certiorari be issued under the seal of this Court directed to The Supreme Court of the State of Kansas commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in Cause No. 35,643, in said Court, entitled Ed Sykes, et al., appellees, *vs.* Fred Lochmann, appellant, to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment and decision of the Supreme Court of the State of Kansas in said case be reversed by this Court.

b. That this petition for a writ of certiorari be assigned to the summary docket of this Court and assigned for oral argument and that the Court grant to your petitioner leave to submit oral argument for a period of one-half hour with the presentment of this petition on a day and hour certain convenient to the Court; within the purview of Rule 28, as formulated by this Court.

c. That your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just: And your petitioner will ever pray.

FRED LOCHMANN,
Petitioner.

FRED HINKLE,
Wichita, Kansas,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The case was instituted by the respondents in The District Court of Sedgwick County, Kansas, was taken on appeal to the Supreme Court of Kansas by the petitioner and the

decision of the Supreme Court of Kansas is officially reported in 156 Kansas 223, 132 Pac. (2nd) 620.

II.

Statement of Case.

The statement of the case containing all that is material to the consideration of the questions presented has been made in the petition for the writ and such statement is hereby adopted and made a part of this brief.

III.

Assignment of Errors.

ONE.

The Supreme Court of Kansas erred in holding under the facts shown by the record before it that the petitioner, by reason of his operation of a packing plant, in the manner in which he operated the same, was subject to the provisions of the Fair Labor Standard's Act of Congress. U. S. C. A. Title 29, Sec. 201, et seq., and therefore erred in sustaining the judgment of the Trial Court.

TWO.

The Supreme Court of Kansas erred in holding that the employees of the petitioner were subject to the provisions of the Fair Labor Standards Act during all of the time they were in the employment of the petitioner regardless of the character of the work which they were performing when the Trial Court found and the record is undisputed that only a small portion of their time was consumed in work which could possibly have constituted the preparation of goods for interstate commerce.

THREE.

The Supreme Court of Kansas erred in denying to the petitioner an exemption from the Act for a period of fourteen weeks in each calendar year for each employee under the provisions of 29 U. S. C. A. Sec. 207 (c).

FOUR.

The Supreme Court of Kansas erred in allowing to the respondents an attorney fee of Three Thousand Dollars.

IV.

PROPOSITION ONE.

Are the employees of the petitioner engaged in work which constitutes the production of goods for interstate commerce within the provisions of the Fair Labor Standards Act?

The findings of fact made by the Trial Court and approved by the Supreme Court of Kansas are set out in full in the opinion of the Supreme Court (R. 237). The only acts which the employees of the petitioner perform which the Court considers constituting the production of goods for interstate commerce is the skinning of the hides off the cattle, the separation of the bones from the meat, removal of the hooves and offal and the depositing of the same on the shipping dock of the petitioner. The manner in which the hides, bones, hooves and offals enter the channels of interstate commerce, as held by the Supreme Court, is by being sold by the petitioner, at his dock, to the Reed Hide Company and Wichita Desiccating Company, both in Wichita. The Reed Hide Company bales and salts the hides and ships them to points outside of Kansas. The Wichita Desiccating Company manufactures the bones, hooves and offal into a product which it ships to points outside of Kan-

sas. The petitioner makes no shipments or sales of his own goods outside of the State of Kansas and the products which he sells are not under federal inspection The business of the petitioner as it appears from the record is the manufacturing and curing of sausage, luncheon meats, etc. The petitioner's relation to the Reed Hide Company and the Wichita Desiccating Company is only that of vendor and vendee. When the Reed Hide Company gets the hides at the petitioner's dock they are not a fit subject for interstate commerce, they must be put through a process by the Hide Company, they would spoil in an hour, and before they could reach the State line and no transportation Company would accept them (R. 33-34). The hooves, bones and offal are also handled in the same way by the Desiccating Company and are also unfit to become a subject of transportation. The process of manufacture of these articles is much longer and more complicated than the processing of the hides, they are ultimately made into a product called tankage (hog feed), packed in hundred pound bags, branded with a trade mark and shipped by the Desiccating Company to other states (R. 61-64). All of the articles in question here end their journey in so far as the petitioner is concerned on his own dock, others transport them in their own vehicles to their own plants where they come to rest again in Wichita (R. 33 et seq. R. 48 et seq.). They remain in this new location for a long time and are processed and changed in form before they begin their interstate journey. The work of the employees in so far as it relates to the preparation of goods for interstate commerce is distant and remote, its effect on interstate commerce at most could be only a distant repercussion. To hold that the Act reaches the work of the employees here, is to indulge in a theoretical application of the Act and to disregard any practical application of the same. To say that the skinning of the hide off of a cow by an employee in the plant of the peti-

tioner is an industrial ritual essential to the ultimate manufacture of the hide into shoes in St. Louis, is as theoretical "far fetched", impractical, and illogical as it would be to say that the farm boy who fed the cow a measure of corn each morning in the cow lot on the Kansas farm is engaged in the preparation of goods for interstate commerce within the meaning of the Act, simply because he was growing a hide on the cow and there are no tanneries in Kansas (R. 33) and he could have no shoes unless the hide is ultimately shipped to St. Louis and made into shoes and he cannot be ignorant of the fact that the cow's hide which he is growing must ultimately arrive by means of interstate commerce at St. Louis. There is no practical difference in the ultimate effect of the work of the boy who puts the hide on the cow with a measure of corn from the boy who skins the hide off the cow with a butcher knife. Congress surely did not contemplate such an application of the Act as has been made here by the Supreme Court of Kansas. We believe that such an application of the Act is not only illogical but is unfair to Congress.

The sole power of Congress to regulate the work of the employees of the petitioner must be found in:

> U. S. Const., Art. I, Sec. 8, Clause 3. "Congress shall have power. * * * To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

All other powers are vested in the people of Kansas.

> U. S. Const. Art. X. "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Congress, therefore, in enacting the Fair Labor Standards Act, cannot go above and beyond its vested power, which is the Constitution.

> "The constitution found it (commerce) an existing right, and gave to Congress the power to regulate it." Gibbons *v.* Ogden (9 Wheat. 1), 22 U. S. 1-211.

The power to regulate commerce is therefore the power, "to prescribe the rule by which commerce is governed." Therefore we must conclude that if the acts of petitioner can be regulated, we must find that the work of the employees so directly effect commerce that the work itself constitutes intercourse between state and state, which, thereupon, would confer upon Congress the power, "to prescribe the rule by which commerce is governed." The Fair Labor Standards Act defines commerce as:

> "Commerce means trade, commerce, transportation, or communication among the several states or from any state to any place outside thereof." (U. S. C. A. Sec. 203.)

If the purely local act of skinning the hides from the cattle, cutting out the bones and hooves, bear such a close and governing force on, "* * * trade, commerce, transportation, transmission or communication among the several states * * *", then state sovereignty is in no wise free from destruction by the national sovereignty.

United States v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 Law Ed. 395. Chief Justice Stone says:

> "To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under Sec. 15 (a) (2) as they were construed below, constitute 'production for commerce' within the meaning of the statute. As the government seeks to apply the statute in the indictment, and as the court below construed the phrase 'produced for interstate commerce'. It embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders

of extra-state customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be elected for shipment to those customers".

Santa Cruz Fruit Packing Company v. *National Labor Relations Board,* 303 U. S. 453, 82 Law Ed. 954. Chief Justice Hughes says:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'Commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.'" Id., p. 554.

* * * * * * *

"To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

Consolidated Edison Co. v. *National Labor Relations Board,* 95 F. (2d) 390, Second Circuit Court of Appeals, March 14, 1938.

> "Undoubtedly the scope of this power (the power of Congress to regulate commerce) must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

National Labor Relations Board v. *Jones,* etc., 301 U. S. 1, 81 Law Ed. 893, Opinion by Chief Justice Hughes:

> "The scope and power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."
>
> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

In *Chassaniol* v. *City of Greenwood,* 291 U. S. 584, 586, Mr. Justice Brandeis, speaking for the court, said:

> "Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country;

and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress Co.* v. *McLean;* and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it steps in preparation for the sale and shipment in interstate or Foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

United States v. *Schechter,* 79 Law Ed. 1570, 55 Sup. Ct. 837, 295 U. S. 495. Opinion of Chief Justice Hughes:

"The slaughtering by wholesale poultry dealers of poultry shipped into the state and purchased by them from the consignees and the resale of the slaughtered poultry to retail dealers are neither transactions in, nor acts relating to interstate commerce, so as to bring the regulations of the wages and hours of employees of such wholesale dealers within the scope of the power conferred upon Congress by the Commerce Clause of the Federal Constitution." "Where the effect of intrastate transactions upon interstate commerce is merely indirect, they do not fall within the power conferred upon Congress by the Commerce Clause of the Federal Constitution."

Kirschbaum v. *Walling,* 316 U. S. 517, 86 Law Ed. 1638. Opinion by Mr. Justice Frankfurter.

"The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of legislation, the history behind the particular field of regulation, the specific terms in which

> the new regulatory legislation has been cast, and the procedures established for its determination. * * * Thus, while a phase of industrial enterprise may not come within the 'commerce' protected by the Sherman Law. * * * Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce" "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which give rise to legislation."

It will therefore appear from the *Kirschbaum* case, supra, that the decision in each case must depend on its own peculiar facts. The Court, in the *Kirschbaum* case, found that the service of the building maintenance workers bore "a close and immediate tie" to interstate commerce as did the oil well drillers in the case of *Warren-Bradshaw Drilling Company* v. *Hall,* 63 Sup. Ct. 125, 87 Law. Ed. 99. There might be a reasonable expectation that the drillers of oil wells producing oil and connected with interstate pipe lines would have a close relation to interstate commerce. This surely could not have been the case, however, if the wells drilled, referred to in the *Warren-Bradshaw* case, had been "dry holes". There could be no reasonable expectation or anticipation that the hides and offals produced here could move in interstate commerce, for as they were produced they were fit only for local commerce. They would have become so offensive and putrid within an hour's time that no transportation company would have accepted them for interstate commerce. The hides, hooves and offals were not "worked on" or "produced" for "trade, commerce, transportation, transmission, or communication among the several states". We say, as was said in *Swift and Company* v. *United States,* 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a

practical one, drawn from the course of business," as it was also said in *Overstreet* v. *North Shore Corporation*, 87 Law Ed. 423, 63 Sup. Ct. Rep. 494, "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations". The drawbridge maintenance workers maintaining a drawbridge on an interstate highway over an interstate navigable river clearly were, "so closely related to that interstate movement as a practical matter that * * * they must be regarded * * * 'as engaged in interstate commerce' ".

We assert that the work of the respondents in skinning off the cattle hides and separating the offals and hooves from the carcasses, bears such a remote, theoretical, and impractical relation to the production of goods for commerce that the provisions of the Fair Labor Standards Act cannot apply to them.

PROPOSITION TWO.

Are the employees of the petitioner subject to the provisions of the Fair Labor Standards Act during the whole of the time they are in the employment of the petitioner when only a very small portion of their time is consumed in work on goods which have only a remote relation to interstate commerce?

The business of the petitioner is the manufacturing and curing of sausage and luncheon meats. As an incident to this work, he must remove the hides, hooves, and offals from the slaughtered animals. He operates a small packing plant and cannot separate the work of his employees into departments and consequently all of the respondents, in the work of manufacturing and curing sausage and luncheon meats, separate the bones, hooves, and offal from the meat and possibly as many as two of them do the skinning. It is conceded that the hides, hooves and offals are the only

articles that could have even a remote relation to interstate commerce. The relation which these products bear to the other business of the petitioner, both in amount of time consumed in preparing them by the respondents, and in money value, is infinitesimal. The Trial Court and the Supreme Court of Kansas, nevertheless, held that the whole work week of the respondents which the jury found to be sixty-three and one-half hours was subject to the Act and figured the wage scale and time and one-half for overtime on that basis. The Supreme Court of Kansas found the proceeds from the annual sale of the hides amounted to $12,000.00, which, the Court assumed, was but a small percentage of the production of the petitioner's plant (R. 251). The undisputed evidence was that the relation of the hides to the total business was 2.9 per cent (R. 123). During a four-month comparative period, the hides brought $3,710.35 and the bones and offal from $20.00 to $30.00 per week (R. 123-124). In 1940, the petitioner killed 15,521 hogs and 2,242 cattle (R. 124), which is a fair comparative period for his business. We continually importuned the Trial Court to ascertain how much time the respondents actually worked on the articles which they claimed were a part of interstate commerce (R. 151 et seq.). We requested that special question No. 4 be submitted to the jury which would have determined this point (R. 147). We called this to the attention of the Supreme Court in specifications of error and on motion for rehearing. The undisputed evidence was that the only respondent who did cattle skinning was Wesley Lewis and he, with one William Lee, performed this work (R. 98). All of the respondents cut out bones and hooves at various times which accumulated from one to two barrels of bones per day (R. 100).

History of Fair Labor Standards Act. 118 F. (2d) 206, 83 C. R. 9168. (Senate—75th Congress, 3rd

Sess. June 14, 1938) Senator Pepper, member of Conference Committee, said:

"It is applicable only to those employees who, themselves, are engaged in interstate commerce, or the production of goods for interstate commerce."

Walling v. *Jacksonville Paper Company*, 87 L. Ed. 393, No. 336, October Term, 1942. Decided Jan. 18, 1943. Opinion by Mr. Justice Douglas:

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." S. Rep. No. 884, 75th Cong., 1st Session, Pt. 8 p. 9169.

Certainly the burden must be on the respondents who seek judgment against the petitioner to establish the amount of time they consumed in working on those goods which they alleged moved in interstate commerce, certainly they must have the burden of establishing by some fair and accepted method the amount to which they claim to be entitled. Neither the Trial Court nor the Supreme Court would place this burden on the respondents and in this they committed error.

Warren-Bradshaw Drilling Company v. *Hall*, 63 Sup. Ct. 125, 87 L. Ed. 99.

"The application of the Act depends upon the character of the employees' activities. Kirschbaum *vs.* Walling, supra, P. 524. The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce."

It is evident that the time which the respondents expended in the skinning of the cattle, cutting out the bones

and offals, was so inconsequential in comparison with the time they expended on products that are conceded not to have affected iinterstate commerce that it is clear that the respondents cannot avail themselves of the provisions of the Act. The work which the respondents do on articles for interstate commerce must be a substantial part of their activities.

Walling vs. *Jacksonville Paper Company,* 87 Law Ed. 393. No. 336 October Term, 1942. Decided January 18th, 1943.

"The applicability of the Act is dependent on the character of the employees' work. * * * If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act."

In trying to determine what is "substantial" the Supreme Court of Kansas permits itself incorrectly to be governed by the amount of production the petitioner produced which bore a relation to interstate commerce, than by ascertaining what is "substantial" by determining the employee's activities related to goods whose movements are in interstate commerce. We see, therefore, that it is the quantum of the employee's activities which are of sole importance. The final effect of the decision is to condemn the petitioner for sixty-three and one-half hours per week when on the other hand it recognizes that the respondents could have worked but an infinitesimal portion of their time on goods for interstate commerce.

Snavely, et al, vs. *Shugart,* U. S. Dist. Ct. Southern Dist. Texas, 6 Labor Cases 61,165. Kennerly, Dist. Judge.

"Where an employee is engaged in both intrastate and foreign commerce, the burden of showing how

much time he was employed in interstate commerce is on the employee in a suit under the Act to recover minimum wages and overtime compensation."

Brown v. Tracy Bottling Co., U. S. Dist. Court, Dist. Minnesota Civil No. 88. June 8, 1942, 6 Labor Cases 61,109.

"A seller and distributor of beer and soft drinks whose sales are entirely within the state of the location of his business establishment and whose employees spend less than one per cent of the total manhours spent by employees of defendant in interstate commerce in the conduct of defendants business, is not engaged in interstate commerce, and an employee suing to recover minimum wages and overtime compensation as provided in the Fair Labor Standards Act cannot recover where he fails to prove that he was engaged in commerce or the production of goods for commerce during any specific work week during his employment. The loading and unloading activities of the plaintiff performed on goods originating from or destined to points outside of the state of Minnesota constituting activities which might be engaged in interstate commerce or in the production of goods for interstate commerce were so inconsequential as to come within the maximum 'de minimis' rule and therefore do not bring the plaintiff within the purview of the Act."

Rouhoff, et al v. *Gromling & Company*, 5 Labor Cases 60,822. Not yet reported in official advance sheets. U. S. Dist. Court of Arkansas. Nimble, District Judge.

"It appeared in this case that the only articles regarded as moving in interstate commerce were certain drop shipments and the Court said, 'In the case at bar, the uncontradicted evidence establishes that the total of the drop shipments is not more than one-half of one per cent of volume of business in dollars and cents, and in tonnage is so infinitesimal a part that it was impossible to estimate it. This case comes squarely

within the doctrine of "de minimis non curat lex," and even conceding that the drop shipments constitute interstate commerce, they are too insignificant for the Court to notice.' "

Wiley Jones vs. *Springfield Missouri Packing Co.* 6 Labor Cases 61,213. U. S. Dist. Ct., Western Dist. Missouri. Reeves, District Judge.

"Another principle applicable and controlling here is that, assuming (though not finding) some of the products of the defendant found their way into interstate commerce, there was no evidence as to what part of the work of the plaintiff's was in interstate commerce and what part in intrastate commerce."

The respondents cannot successfully assert that there is in this case, a hopeless commingling of goods under the authority of *U. S.* vs. *Darby*, 312 U. S. 100, 85 Law Ed. 609, wherein Mr. Justice Stone says:

"A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if interstate commerce is to be effectively controlled."

Now it must be remembered that in the *Darby* case, the employees worked all of their time on products all of which could be and possibly were transported in interstate commerce. Quoting again from the *Darby* case:

"* * * that the production for commerce, intended, includes at least production of goods, which at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."

In the case at Bar, there is no confusion of goods because the Court definitely finds that the only goods with which

we are concerned are the hides, hooves and bones. Neither is the question here one where the Government is seeking to enjoin certain operations or shipments but this is a case of employees seeking to recover time and one-half for overtime and they are faced with the burden of proving the amount of time which they worked on the prohibited article. It appears in so far as we are able to determine that in the case of *Walling* vs. *People's Packing Company*, decided December 16, 1942, Tenth Circuit Court of Appeals, 6 Labor Cases, 61,373, that the employees referred to consumed all of their time in working on the alleged prohibited articles and that case is not authority on this proposition. The Court there found at least that the employees consumed a "substantial" amount of their time on the prohibited articles. We quote from the opinion:

> "While the primary object of the work of employees in the slaughtering departments is to produce edible meat and meat products, the major portion of their manual efforts is exerted in the removal of hides and the inedible portions from carcasses, thereby producing valuable by-products."

We therefore assert that the Supreme Court of Kansas committed error in subjecting the petitioner to the provisions of the Fair Labor Standards Act when the respondents consumed only an infinitesimal and unsubstantial portion of their time and manual efforts on products that have even a remote relation to interstate commerce.

PROPOSITION THREE.

Is the petitioner entitled to a fourteen-week exemption from the operation of the Act under Section 7 (c) of the Act?

We have here the anomalous situation of the Court, holding that the respondents work their whole time in the prep-

aration of goods for interstate commerce and assessing judgment against the petitioner accordingly, and on the other hand denying to the petitioner the fourteen week exemption, justifying the holding on the ground that the respondents do not work their whole work week in the preparation of goods for commerce. (R. 238-240) The Courts which have had occasion to consider this question are as follows:

Fleming Adm. v. *Swift & Company,* U. S. Dist. Court, Northern Dist. of Ill., Nov. 3, 1941. Igoe, Dist. Judge. 4 Labor Cases 60,685. Not reported in Official Adv. Sheets.

"An employer may take the benefit of the exemption law during any work week, whether or not they are consecutive, in the calendar year not exceeding fourteen work weeks in the aggregate for employees in the place of employment where the employer is engaged in exempt operations. This is exemption which comes under section 7(c) of the Act and includes, among others, those engaged in hog dressing, beef dressing, cleaning of hog casings, warming pork and beef, warming fancy meats, washing beef and pork, dressing and sanisealing, and handling, slaughtering, and dressing as it is used in trade usage."

Walling v. *Swift & Co.,* U. S. Circuit Court of Appeals, Seventh Circuit. October 27, 1942, 6 Labor Cases 61,261.

"The fourteen week exemption granted by Section 7(c) of the Act for handling, slaughtering or dressing livestock need not be taken by the employer during the same work week for all the employees in the place of employment who are within the scope of the exemption, but may be taken as to each individual employee for fourteen weeks. To hold otherwise would be to disregard the purpose of the exemption which is to enable the employer to avoid the burden of time and

> one-half for overtime in those seasonal peak periods when he must work to take care of the product on the market."

If the decision of the Supreme Court of Kansas is to be reconcilable with itself, we believe the fourteen week exemption should be allowed.

PROPOSITION FOUR.

What amount should be allowed to respondents as attorney fees?

Section 16 (b) of the Act, (29 U. S. C. A. 16 (b)) provides that:

> "The Court in such action shall, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action."

We appreciate, of course, that the amount of attorney fees to be allowed must be governed by the sound discretion of the Court. The Court allowed judgment for the respondents in the sum of $4,938.36 and added to this an attorney fee of $2,000.00 and added an additional $500.00 if the petitioner should appeal to the Supreme Court of Kansas and added an additional $500.00 if the petitioner should appeal to this Court. Therefore, the attorney fee is now $3,000.00 in addition to the judgment for the respondents in the sum of $4,938.36. The attorneys for the respondents have a written agreement that they are to receive fifty per cent of the amount recovered. (R. 202) If this contract is performed specifically, it would be hard to determine whether the attorneys would get a fee of $3000.00, or fifty per cent of the whole, which would be $3,969.18, or the $3,000.00 and fifty per cent of that recovered for the re-

spondents which would be $5,469.18, leaving the respondents $2,469.18 for their portion. We offered the testimony of some very prominent Kansas attorneys which indicated that the Court abused its discretion in making such an allowance. (R. 175-186) We doubt if it was within the contemplation of Congress that the petitioner should suffer such a burden in attempting to obtain a judicial clarification of the language employed by Congress.

Midcontinent Pipe Line Co., et al. v. *Hargrove.* October. 129 Fed. (2nd) 255. Tenth Circuit Court of Appeals.

Huxman, Circuit Judge, Dissenting—"The penalties provided by the Act are severe—so severe that in many instances employers hesitate to assert rights in Court which they honestly feel they have, because of the penalties they suffer if they are mistaken and the judgment goes against them. This should be kept in mind in the administration of the Act. Excessive and burdensome attorney fees should not be added to the mandatory penalties of the Act where a claim is resisted honestly and in good faith by an employer."

Robinson v. *La Rue,* 156 S. W. (2nd) 432. Sup. Ct. of Tenn. November 29, 1941.

"Defendant in error never made any claim that he was subject to the Act or that he was entitled to more compensation than he was receiving until after his services were dispensed with. The penalty imposed by this Act is harsh and severe, and where, as in this case, a doubt exists by the employer as to whether it applies to a particular employee, we are not disposed to place a greater burden upon the employer than is necessary in order to comply with its mandates."

We assert, therefore, that the Supreme Court of Kansas committed error on this proposition.

Summary.

The Supreme Court of Kansas committed error in the following respects:

I. In holding that the work performed by the respondents constituted the preparation of goods for interstate commerce.

II. In holding that the petitioner was subject to the Act during the whole period of the respondents employment when they only worked an infinitesimal portion of the time on the preparation of goods that had even a remote connection with interstate commerce.

III. In holding that the petitioner was not entitled to a fourteen week exemption from the Act under Section 7 (c) thereof.

IV. In abuse of discretion in allowing attorney fee which is not compatible with the reason and spirit of the Act.

Wherefore, the petitioner prays this Court to grant a writ of certiorari and review the decision of the Court below.

Respectfully submitted,

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(33)

IN THE

Supreme Court of the United States

No. 898

FRED LOCHMANN, *Petitioner,*

vs.

ED SYKES, for and on behalf of himself and certain others, similarly situated and as agent for those others, to-wit: Max Phillips, John Wesley Phillips, Lewis Griffin, LeRoy Griffin, Wesley V. Louis, and Albert Headley, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION.

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CLIFFORD H. PUGH,
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Of Counsel.

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STATEMENT OF FACTS.

In view of the rule that the granting of the writ of certiorari rests in the discretion of this court, we think it might be of assistance to the court to make a short statement of the facts. The petitioner operates a general packing plant in Wichita, Kansas. At various times since the effective date of the Fair Labor Standards Act of Congress, petitioner has employed each of the respond-

ents herein in such packing plant. The respondents were each engaged in general work in the plant of the petitioner, consisting in a large part of work in the killing, slaughtering, skinning and dressing of cattle and hogs belonging to the petitioner. The cattle and hogs slaughtered by the petitioner were purchased by the petitioner at the stock yards in Wichita, Kansas, indiscriminately of origin from in-state and out-of-state points. The livestock market of Wichita, Kansas, receives stock from the state of Oklahoma, Colorado, and other points. Each day the petitioner would purchase on the open market, such hogs and cattle as he might require for slaughtering that day, without reference to whether the cattle had been shipped from points out of the state.

They were slaughtered by the petitioner, through his employees, some of whom were the respondents, and the edible portions of the animals were processed and sold as meat products in the State of Kansas in competition with similar products offered by other producers.

The edible portions of the animals were sold in the state of Kansas; the hides were sold to the Reed Hide Company, who shipped the hides in interstate commerce and to points out of the state. The other inedible portions were sold to desiccating companies, who processed such and made tankage or fertilizer, which tankage or fertilizer was subsequently sold out of the state and transported through the instrumentalities of interstate commerce.

In addition to the above activities, petitioner purchased from out of the state, certain articles such as cheese, oleomargine, etc., which he wholesaled to retail stores and jobbers in Kansas. In the processing of the meat, the respondents used spices and binding meal,

which he purchased outside of the state and shipped into the state.

The respondents herein, as employees of the petitioner, did whatever work that came to hand in the plant of the petitioner. A great deal of such time was devoted to the skinning, slaughtering, killing, and dressing of cattle and hogs, but also, to other activities necessary to be carried on in the plant of the petitioner. (R. 108)

PROPOSITION ONE.

We shall reply to the propositions of the petitioner's brief in the order in which petitioner sets them out. Petitioner propounds the question:

> "Are the employees of the petitioners, (respondents herein) engaged in work which constitutes the production of goods for interstate commerce, within the provisions of the Fair Labor Standards Act?"

The question propounded by proposition one has been decided by this court adverse to the argument and contention of the petitioner.

In *United States of America v. Darby,* 312 U. S. 100-126, this court had before it an indictment charging the Darby Lumber Company of acquiring raw material in the state of Georgia, which he manufactured into finished lumber with the intention, when manufactured, to ship it in intrastate commerce and some part of it, to points outside of the state of Georgia, and that he had failed to pay minimum wages overtime and to keep records.

The lower court sustained a demurrer on the grounds that manufacturing within the state was beyond Federal Power and that the act was unconstitutional as a regulation of interstate commerce.

This court held the act was valid in its entirety. In the course of the opinion, this court said:

> "And finally, we have declared 'The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the state over intrastate commerce."

Further the court said:

> "Without attempting to define the precise limit of the phrase (production for commerce) we think the acts alleged in the indictment are within the sweep of the Statute. The obvious purpose of the act was not only to prevent the interstate transportation of the proscribed product but to stop the initial steps toward transportation, production with the purpose of so transporting it * * * production for commerce, intended, includes at least production of goods, which at the time of production, the employer, according to the normal course of his business, intends and expects to move in interstate commerce, although, through the exigencies of the business all of the goods may not, thereafter, actually enter into interstate commerce."

Further the court said:

> "The means adopted by section 15-(a) (2) for the protection of interstate commerce by the surpression of the production of the condemned goods for interstate commerce is so related to the commerce and so effects it as to be within the reach of the commerce power. See *Currin v. Wallace,* Supra. 306 U. S. 11."
>
> "Congress to attain its objective in the surpression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions has made no distinction as to the volume or the amount of shipments in the commerce or of production for commerce by any particular shipper or pro-

ducer. It recognized, that in present day industry, competition by a small part may effect a whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 21-82, 75th Congress, 1st Session, page 7. The legislation aimed at a whole embraces all its parts."

The question propounded in proposition one, by the petitioner, is, also, answered by this court's decision in *Kirschbaum v. Walling,* (consolidated with *Arsenal Building Corporation v. Walling*), 316 U. S. 517. This case involved the question, whether the employees of the owners of certain buildings, whose work consisted of keeping said building in condition and in operating elevators in said building for the benefit of tenants engaged in the manufacturing of or buying and selling of clothing in interstate commerce.

Two Circuit Courts of Appeal had held that the activities of such employees were under the act. This court granted certiorari because of the importance of the case. In affirming the decision of the Circuit Court, this court said, "We agree, however, with the conclusion of the court below; in our judgment, the work of the employees in these cases, had such a close and immediate tie with the process of production for commerce and was, therefore, so much an essential part of it that the employees are to be regarded as engaged in operations necessary to the production of goods for commerce."

In *Fleming, administrator, v. Peoples Packing Company,* District Court, Western Division, Oklahoma, 42 Fed. Suppl. 868, the facts were the same as the case at bar, and the contentions advanced by the petitioner in the case at bar are the same as were advanced in that cause. The District Court held that the employees of the Packing Company were not under the protection of the act.

The hides and offals in that case represented some 3 or 4% of the value of the carcass. The hides were sold to a purchaser in Oklahoma City, who in turn sold them outside of the state. The offals were sold to a purchaser in Oklahoma City who processed them, converting them into grease, and tankage. Then the products were sold outside of the state.

The case was appealed to the Circuit Court of Appeals for the 10th Circuit and was decided by that court in 132 Fed. (2d) 236, Phillips, Circuit Judge, after stating the facts, clearly paralleling the facts in the case at bar, said:

> "In order to produce the tanned hides and the leather products made therefrom, it is necessary to slaughter the animal and remove the hides, and in order to produce the tankage and greases, fertilizer, lubricants, and soap made therefrom, it was necessary to slaughter the animal and separate the offals from the edible portions of the carcass. Clearly the employees in question were employed in handling the hides and offals and in an operation necessary to the production of the tanned hides, fertilizer, lubricants, and soap.
>
> "Admittedly, where the work of the employees in question has only a tenuous relation to the production and is not in any real sense necessary thereto, the employee is not engaged in the production of goods or in handling or in working thereon.
>
> "Where, however, the tanned hides, the fertilizer, the lubricants, and the soap resulting from the processing of the hides and offals could never have been produced had not the Peoples' Packing Company's employees removed the hides from the slaughtered animal and separated and recovered the offals from the carcasses. They performed the first step in the series of operations that produced the ar-

ticle that went into commerce. They worked on the carcasses and they removed and handled the hides and offals, the original product from which the processed article resulted. We conclude that the employees, in question, were engaged in the production of goods for commerce and in the handling and working on such goods.

The act makes no distinction as to the volume or amount of shipments in commerce or in production for commerce by any particular shipper or producer. Its policy is to exclude from commerce all goods produced for such commerce which do not conform to the specified labor standards. Nor is it material that 96% of the value of the carcass went into meat products, which were sold in intrastate commerce, so long as a substantial amount of hides and offals were processed into products, which reached the channels of commerce."

This court in No. 699, *Peoples Packing Company, petitioner, vs. Walling, Administrator of the Wage and Hour Division,* on March 15, 1943, —U. S.—, 87 L. Ed. 722 denied a petition for the writ of certiorari to the United States Circuit Court of Appeals for the 10th Circuit Court, the decision last above referred to and from which we have quoted; if the act of this court, in denying the petition for certiorari can be construed as approving or affirming the decision of the 10th Circuit Court of Appeals, then every question propounded by the petitioner in the case at bar has been answered; except his claim for fourteen (14) weeks exemption.

The records in this case shows that the petitioner knew at the time that he sold the hides to the Reed Hide Company; that the Reed Hide Company would ship the hides out of the state; for the petitioner stated there were no tanneries in Kansas. He, also, knew that the products made from the offals would be shipped and sold outside

of the state. (R. 237) So we find that proposition No. 1 of the petitioner's has been decided by this court.

This court again passed on the question proposed by petitioner in the case of *Warren Bradshaw Drilling Company v. O. V. Hall, et al,* 87 L. Ed. 99 (Advance sheets). Among other things this court says:

> "The evidence supported the findings that some of the oil produced, ultimately found its way into interstate commerce."

That cause involved the crew of a rotary drill. The rotary drill was used to drill a hole to near the producing sands, when it was removed and different tools and different crews completed the drilling of the well, some of which would be dry holes but some of which produced oil, and the crew of the rotary drill was held to be under the protection of the act. Upon this point, we submit that the petition for certiorari should be denied.

PROPOSITION TWO.

Petitioner states proposition number two as follows:

> "Are the employees of the petitioner subject to the provisions of the Fair Labor Standards Act during the whole of the time they are in the employment of the petitioner, when only a very small portion of the time is consumed in working on the goods which has only a remote relation to interstate commerce?"

The statement of petitioner, "That only a small portion of their time is consumed in working on goods which has only a remote relation to interstate commerce," has been completely answered by this court in *Peoples' Packing Company, v. Walling, Supra.* The contention that the employees worked only a portion of the time in the

production of goods for commerce and the remaining portion of their time, at such endeavor other than the production of goods for commerce has been decided by the Federal Court adverse to the contentions of the petitioner.

First let us call attention to the interpretation of the administrator, CCH Labor Law Service, Vol. 2, page 24,507:

> "Where an employee is subject to the provision of the act for certain hours worked during the work week and is exempt therefrom for other hours worked during the same work week, no segregation of either hours worked or the rate of pay during that particular work week may be permitted under the act. To interpret the provision of section seven (7) (A) of the act, otherwise, would render it easy to defeat the objectives of the act since the employer might employ his employees for the minimum hours in the production of goods for interstate commerce and employ them in intra-state commerce during the same work week for additional hours without limit."

The point was passed upon in *Fleming, administrator, vs. Knox, et al.,* District Court S. D. Georgia, decided December 22, 1941, 42 F. Supp. 948. Quoting the Syllabus:

> "Where employees during a work week interchangeably engage in working in a department of employer's lumber business involving only intra-state business and in other departments involving production of lumber for shipment in interstate commerce, the employer was required to pay to the employee, the wages prescribed by the Fair Labor Standards Act for the entire time worked including time spent in the department involving intra-state business alone." 42 F. Supp. 948.

These conclusions are supported by the express language of the act itself. The prohibition contained in sections 6 and 7 is a prohibition against the employment generally of employees of a designated class. Petitioner's contentions amount to the argument that the act should be construed to be merely prohibition against employment in the production of goods for commerce for more than forty (40) hours, but the act provides:

> "No employer shall, except as otherwise provided in this Act, *employ any of his employees who is engaged in commerce or in the production of goods for commerce.* * * * " Section 7. (Emphasis ours.)

and,

> "Every employer shall pay to each of his employees *who is engaged in commerce or in the production of goods for commerce wages* at the following rates * * * " Section 6. (Emphasis ours)

It is thus apparent that the interpretation of the Administrator is supported by the plain language of the act itself. In addition to this, the testimony in this cause (R. 58, 108) shows that a very substantial proportion of each day was spent by each of the parties in this case to the killing and dressing of livestock and to the production of hides and offals for sale in commerce. The petitioner can not escape the burden of the act and at the same time take the benefit of interstate commerce. If the employees were employed by him for more than forty (40) hours and for less than the wages prescribed by the act and if they were employees coming within the act designated by Congress during each week upon which recovery was sought and granted, then the petitioner must respond in damages as provided by the act.

The decisions of lower Federal Courts cited by petitioner establish only that the employees must show that during each week for which recovery is sought they were of the designated class i.e., employees who were engaged in the production of goods for commerce. This the proof amply showed and the Trial Court so found and the decision upon the proof was approved by the Supreme Court of Kansas. Respondents do not concede that certiorari is a proper remedy to raise in this court a question of proof.

Further, upon this point, we would like to call the court's attention to the fact that the petitioner did not in the trial court, tender any issue upon this point. The act itself imposes a duty upon petitioner to keep a record of the hours worked and the wages paid, and in the case at bar the petitioner kept no record of the hours worked, and the trial court made no finding as to any hours worked except the hours worked in the production of goods for commerce.

PROPOSITION THREE.

Petitioner in his proposition three propounds the question, "Is the petitioner entitled to fourteen (14) weeks exemption from the operation of the act under section 8 (C) of the act?" The question is answered adversely to petitioner in the case of *Fleming v. Swift and Company,* 41 Fed. Supplement 825; Affirmed 131 Fed. 249. Further, the petitioner did not raise the question, by his pleadings, in the trial court. Since the employer may select the week or weeks that he claims as exempt and that may apply to any number of his employees, as he may see fit, it was an affirmative defense and should have been pleaded in the trial court.

PROPOSITION FOUR.

Proposition four stated by the petitioner is, "What amounts should be allowed to respondent as attorneys' fees?" The act provides that the trial court shall allow reasonable attorneys' fees to be paid by the defendant. This matter rests in the sound discretion of the trial court. This court in its long history has never yet granted a petition for certiorari to control the discretion of a state trial court. I can imagine no grounds, in the granting of a fee by the trial court, that would be of interest or that this court would review. Perhaps the matter is not properly presented here, but we suggest that this court should fix reasonable fees for the preparation of the brief in the event that the petition for certiorari is denied.

We respectfully submit that the petition should be denied.

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